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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRÉD BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICAËLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADORE SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAL, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR PETITIONER

JOSEPH M. PROSKAUER,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
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REPLY BRIEF FOR PETITIONER

The Circuit Court has held that all office employees of manufacturing or mining companies, no matter what they do or where located, are necessary to and thus engaged in production and that, therefore, maintenance workers of buildings in which employees are housed are likewise so engaged.

The manufacturing tenants in this case maintain their offices largely as sales offices. And the Circuit Court has held that selling constitutes production of goods for commerce.

Briefs of respondents and Administrator deal most apologetically with this holding of the Circuit Court. They emphasize rather a factual contention (which we shall show to be baseless) grounded on nothing held either by the District or the Circuit Court. They claim that a substantial number of these manufacturing tenants are otherwise substantially engaged in actual production of goods in this building. This was found neither by the District Court nor the Circuit Court but we accept the challenge and we meet the point.

Using the technique of emphasizing the inconsequential, (A) the Administrator builds an unreal and distorted picture of remote control by "managerial" offices of manufacturing elsewhere carried on and (B) respondents describe many of the manufacturing tenants as "advertising, publicity and editorial offices".

We take up (A) and (B) successively.

A

The manufacturing companies do not substantially direct or control production from their offices in the building herein and a fortiori the elevator men are not engaged in production

The Administrator attempts to show a resemblance between the multi-tenanted office building in this case and the (Borden) building involved in No. 688.

After urging in No. 688 that the maintenance of its central office building is " . . . part of an integrated effort for the production of goods " (br. p. 20), he urges that the same is true here though conceding that the problem is "more complex" (No. 688, br. fn. p. 15).

The Administrator's brief speaks of the manufacturing companies' "managerial" offices. A table listing 16 of the

20 manufacturing tenants (classified by the Courts below as "Class I") appears in the footnote on page 12 of its brief. It is claimed that these tenants, who occupy 19.81%* of the total rentable area of the building, "carry on management activities closely integrated with their manufacturing elsewhere".

We will now demonstrate by quoting respondents' own witnesses that there is no substantial basis for including the following 11 tenants listed in said table of allegedly "integrated managerial offices":

(1)

J. H. Dunning Corp. (1,100 sq. ft.) conducts a sales office where it takes orders for wooden boxes, manufactured in Maine, Virginia and California (R. 162). The president of the company has an office in the suite.

The Administrator has seized upon a witness' flippant statement that the employees "don't blow a whistle without his [the president's] approval" and it is stated that this includes blowing the whistle regarding production. [Respondents state that the president indicates "the orders to be worked on" (p. 20).]

The answer to these contentions may be found in the following testimony elicited by respondents' counsel:

"Q. He instructs them what to make, I suppose?

A. No, that is hardly possible. * * *

Q. You have a foreman at these various factories?

A. That is right.

Q. Superintendents? A. That is right.

Q. And they control the actual process of manufacturing, don't they? A. That is right" (R. 164).

*It is conceded by the Administrator that there is no "integration between office and factory"—no connection with production—in the case of the remaining four (sales) offices in Class I:

Chase Brass & Copper Co.	12,155 sq. ft.
Blackington	980 " "
Thomas A. Edison, Export Division	2,500 " "
Tennessee Eastman	920 " "

(2)

Arkell Safety Bag Co. (2,510 sq. ft. [R. 183]) manufactures bags in Brooklyn and Chicago. The office herein is the sales office for the Eastern part of the United States. The salesmen "call on the customers and in most cases the orders are mailed in" (R. 183).

Teletype messages are sent from the office to Chicago and Brooklyn, but the secretary stated that the messages have to do with "complaints from customers for not receiving delivery in time" (R. 184).

Pressed as to whether instructions "concerning production" are given over the teletype, the witness testified that the teletype discussions "all relate to deliveries".

A traffic department sees to it that orders are "properly routed" (R. 187) and the office here takes care of purchasing and insurance for the company's properties (R. 187-189). Thus there is no direction of production.

(3)

United Feldspar Minerals Corp. (980 sq. ft. [R. 248]), a mining concern, houses* two officers of the corporation. But the one who testified stated that the office in New York is used for letter-writing purposes:

"Q. . . . What work do you do? A. . . . I run the corporation.

Q. You run it from that office? A. No. I run it when I go down to the plants entirely. I write letters there, yes" (R. 249).

* The Trial Judge in his opinion pointed out that executives and representatives of industry carry on "business activities in rooms at (the) hotels" and then said: "Would it not be quite as logical to say that the building maintenance employees of these hostelrys, as well as the plaintiffs in this action, are within the Act?" (R. 321).

(4)

Vanity Fair Mills (6,415 sq. ft. [R. 165]) is included in the table of "managerial offices". But its representative testified that:

"A. The New York office is a sales office and every person connected or employed by the New York office contributes to the sales function.

Q. Will you describe those functions? A. Waiting on customers; we take their orders; we have telephones which require telephone girls; we have an office boy, and we keep some of our records there" (R. 165-166).

Though the advertising manager has conferences with representatives of the company's advertising agency, the copy is written by the agency and not by the company's employees (R. 167).

The office does not buy raw materials for the company, though occasionally a buyer, while in New York, may just

"come to use our office as a convenience to hang his hat there, and that is about all" (R. 171).

(5)

Ames Bag Co. (300 sq. ft. [R. 228]) has a small office in the building which is used for sales of its wares and in connection with purchasing mill products. Both activities are carried on by telephone (R. 229). The company manufactures cotton bags in Cleveland (R. 228).

(6)

Perolin Company (1,990 sq. ft. [R. 209]) is described as "the sales department" of the company for the New England and Atlantic States (R. 209). The company deals with jobbers primarily (R. 209) and communication with them is maintained through the mailing of bulletins, approximately 15 times per year (R. 212).

(7)

Beechnut Packing Company occupies 2,690 sq. ft. (R. 97). Its advertising manager testified that the office at 10 East 40th Street is "merely an accommodation office" to make it convenient for the advertising manager to meet with publishers and representatives of radio stations located in New York City (R. 101-102).

Space in the office is reserved for the president, but he uses such office space only when he happens to be in New York, his headquarters being in Canajoharie, at one of the company's large manufacturing plants (R. 102-103).

(8)

Cherokee Spinning Company (770 sq. ft. [R. 137]). A full page of respondents' brief (pp. 19-20) is devoted to an attempt to show that this office is substantially devoted to designing the company's products.

The facts are that the function of this office is "to sell our merchandise" (R. 138). The only designing done there is the sketching of handkerchief designs (on paper) by the telephone operator

"when she is not too busy at the switchboard" (R. 142-143).

(9)

Domestic Concentrates (200 sq. ft. [R. 153]) is engaged in two businesses. One is purely export* and the other is the manufacture of food flavors.

Upon the trial, counsel for respondents sought strenuously to show that instructions concerning production were sent from the office at 10 East 40th Street (R. 156-157). But the witness finally made it clear that he gave no

* The Circuit Court did not find that offices of export and import firms (Class 8) which occupy 3.7% of the building are engaged in production of goods for commerce (R. 341-343).

instructions "about the manufacture" (R. 157) and that the instructions had to do with informing the factory what had been sold, etc., and "had nothing to do with actual process of producing" (R. 158).

(10)

General Motors (Cleveland Diesel Engine) occupies 2,140 sq. ft. (R. 61) and its offices are devoted exclusively to "sales and service" (R. 62). Upon what basis it is claimed that this sales office of General Motors has anything to do with production it is difficult to understand.

(11)

Ediphone Division of Thomas A. Edison Company (2,300 sq. ft. [R. 112]). The Administrator erroneously states that we concede that this company belongs to this category (br. p. 56).

As a matter of fact this tenant is a sales and service office which sells and installs Ediphones (hearing instruments) in *New York City only* (R. 112, 116). Since no sales are made "to anybody outside of New York" (R. 114), not even the employees of this tenant who sell and install the Ediphones would be covered by the Act.

Summary

Thus of the manufacturing and mining company tenants (Class 1), eleven who do not have even a tenuous relationship with actual production, occupy a total of 21,395 sq. ft. Subtracting such area from 46,425 sq. ft., the total for the list of tenants on the Administrator's table of Class (I), "managerial tenants", leaves only 25,030 sq. ft. or 10.3% of 234,245 sq. ft., the total rentable area.

Since we agree with respondents (see (B) *infra*) that *Standard Magazines, Inc.* and *Eastman Kodak Company*, both of which appear on the Administrator's table of managerial offices, functionally belong among the tenants en-

gaged in publicity and editorial activities, and have included their space under our figures for publicity and editorial activities (pp. 12-13 *infra*), the space occupied by these two tenants, 5,700 sq. ft. and 4,450 sq. ft., respectively (R. 285, 69, 83), should be subtracted from the 25,030 (of allegedly "managerial" space), leaving a balance of only 14,880 sq. ft. or 6% * of the rentable area (234,245 sq. ft.), which may even remotely be considered to have some connection with production.

The question in this case is not whether an employee of a tenant is engaged in production but whether the production activities of the tenants collectively are so widespread and multifarious as to lead reasonably to the conclusion that the porter and the elevator man who serves the building is a producer.

The advertising manager of the Beechnut Packing Company established "an accommodation office" so that he could confer with agencies handling the company's advertising.

Can it be said that the elevator operator is engaged in the food manufacturing business because he is necessary to the advertising manager, whose activities in turn are necessary to the agency whose work helps sell the products of the factory in Canajoharie?

Can it be said that the porter who cleans the halls of this building has "a close tie" with the production of Ames Bags

* This 6% is occupied by 3 tenants.

Two of the three, Forbes Lithograph Company (New York and Philadelphia Divisions) and Cluett, Peabody, occupying, respectively, 3,360 sq. ft. and 10,010 sq. ft., will be discussed in the succeeding point.

S. S. White Dental Mfg. Co., which occupies 1,510 sq. ft., is really a sales office of metal shafting equipment. In view of the small space occupied by this tenant and the fact that drawings and designs are made for these metal shaftings in connection with such sales, we do not include this tenant among offices used purely for sales purposes.

because in an office 20 by 10 feet in area employees of the company make telephone calls, as a result of which materials are purchased for the factory in Cleveland?

Surely it bursts the bounds of common sense to call these maintenance workers producers of goods.

B

Only two of the manufacturing and mining tenants may functionally be classified with publicity and editorial offices

Despite the unreversed finding of the trial court that

" . . . the percentage of labor and space actually utilized in the building by employees of any of the tenants in connection with the publicity and advertising prepared in or outside of the building has not been mathematically computed, but in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 316),

respondents claim that more than 20% of the space of the building is utilized for publishing and advertising (see summary, br. p. 56) and have presented in Table II-a (p. 76) a list of manufacturing tenants which are classified as "advertising, publicity and editorial offices".

To accomplish their purpose respondents have resorted to the accentuation of minutiae.

(1)

Thus, the *Arkell Safety Bag Company* is listed in respondents' Table II-a (p. 76) among "advertising, publicity and editorial offices" though respondents' witnesses testified:

"We don't do very much advertising. We have a listing in one or two trade papers".

and that from time to time letters are sent to customers (R. 188). This office, as already demonstrated (p. 4, supra), is a sales office for the "Eastern part of the United States" (R. 183).

(2)

The *Perolin Company* is twice listed in respondents' Table II-a (p. 70) as an "advertising, publicity and editorial office" because approximately 15 times per year this sales office sends a bulletin to its customers to apprise them of wares on hand. Except for "one or two a year (prepared) to replace old ones", the same bulletins are used from year to year (R. 212).*

The company's representative described its office as "the sales department of the company" (R. 209).

(3)

Vanity Fair Mills is included in said list of "advertising, publicity and editorial offices" because one employee of this sales office confers with advertising agencies who handle advertising for the company (R. 167-169).

Respondents' own witness described the *Vanity Fair* office as a sales office and every person connected or employed by the New York office contributes to the sales function (see p. 5, supra).

(4)

Forbes Lithograph Manufacturing Company† is twice included in said list, although one of the two divisions, the New York division, is described as a sales division only where "no actual art work (is) done". It sells printing and lithography manufactured in Chelsea, Massachusetts (R. 57).

* The printing is done by an outside printer (R. 211).

† *Forbes Lithograph and Cluett, Peabody* are included in the 6% of "managerial" space (see p. 8 supra).

From respondents' description of the activities of this tenant—spread over four pages of its brief (pp. 11-14)—which occupies 3,360 sq. ft. in all [1.5% of the building (R. 56)], one would get the impression that its space is used as an art studio where tremendous quantities of commercial art are produced.

As related by the officer of this company, all the actual art work done in connection with the selling services of the "Philadelphia division" is confined to an area of "80 to 100" sq. ft. (R. 57).

The office was described "as the selling agent for the Forbes Lithograph Company. That is what it amounts to" (R. 40).

(5)

*Cluett, Peabody & Co.** is also twice listed among the "advertising, publicity and editorial offices". While it is true that advertising for Cluett, Peabody is handled from its office in the building herein, that activity represents only a fraction of its total activities and it is limited to conferences between Cluett's advertising representatives and the agencies and artists in the New York area which actually prepare the advertising (R. 239-241). Only five employees out of a total of 38 have anything to do with the advertising or publicity work (R. 237-243).*

What has been said about the Cluett, Peabody office applies equally to *Beechnut Packing Company*, which is likewise included in this list. The advertising manager testified that his department is in Canajoharie but that the 10 East 40th Street office was "merely an accommodation office" to make it convenient for him to meet with

* The offices of Cluett, Peabody contain a showroom where buyers from all over the country view the company's products (R. 237). Eight salesmen work out of the office. A market research department is maintained "for the benefit of the sales department" (R. 242). The president has his office in the building and there he confers with the various subordinate officers in charge of the various divisions of the company's activities (R. 238).

publishers and representatives of radio stations located in New York City (R. 101-102).

The sales manager of the food division and the salesmen working under him also use the office (R. 99-100) and the president has an office there which he uses when he is in New York, though his headquarters is in Canajoharie (R. 102-103).

Summary

There remains (of the manufacturing company tenants listed in respondents' Table II-a.) only *Eastman Kodak Company* [4,450 sq. ft.] which uses its space for publicity work and *Standard Magazines, Inc.** [5,700 sq. ft.] which does editorial work on magazines. Adding 10,600 sq. ft., the combined area of these offices to the 15,520 sq. ft. occupied by the group of publicity, editorial and trade organizations tenants listed in respondents' Table II (p. 75), the total space for this group would be 25,670 sq. ft., representing less than 11% of the total rentable area of the building.

We emphasize that the primary question is not whether the direct employees of these tenants are "necessary" to production of goods for commerce. In any event, the extreme of any claim that could be made on these figures is that possibly, if editorial and publicity work (11%) and management activities (6%) may be considered production, the tenants of not over 17% of the rentable area of the building have this tenuous tie to production.

We confidently argue that this cannot possibly be considered as a basis for holding that the elevator men and other workers employed by the owner of the building are really substantially engaged in the production of goods for commerce.

* This is the only "manufacturing" tenant referred to by the Circuit Court in its description of advertising and publicity tenants: "One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm" (R. 340).

Summary of the Building Occupancy

In view of what appears in the respondents' and the Administrator's amicus brief, it may be helpful at this point to present an over-all and complete "activities" picture of the multi-tenanted building involved in this case.

The building has a total rentable area of 234,245 sq. ft. It is occupied as follows:

TABLE OF OCCUPANCY

	No. of Tenants	Activities Carried on	Area	Per- centage of Total Area
I. Mfg. & Mining Tenants	20			
Chase Brass & Copper Co.			12,155	
Blackington			980	
Thomas A. Edison, Exp. Div.			2,500	
Tennessee Eastman			920	
J. H. Dunning Corp.			1,100	
Arkell Safety Bag Co.			2,510	
United Feldspar Minerals Corp.		Sales offices	980	
Vanity Fair Mills			6,415	
Ames Bag Co.			300	
Perolin Company			1,990	
Beechnut Packing Co.			2,690	
Cherokee Spinning Co.			770	
Domestic Concentrates			200	
General Motors			2,140	
Ediphone Division			2,300	
			37,950	16.2%*
Forbes Lithograph Co.		"Managerial"	3,360	
Cluett, Peabody & Co.			10,010	
S. S. White Dental Mfg. Co.			1,510	
			14,880	6%*
Standard Magazines, Inc.		Advertising, publicity	5,700	
Eastman Kodak Co.		and editorial	4,450	
			10,150	4.3%*

*These groups of tenants were held, by the Circuit Court, to be producers.

<i>Class</i>	<i>No. of Tenants</i>	<i>Activities Carried on</i>	<i>Area</i>	<i>Per- centage of Total Area</i>
II. Sales Agencies	17	Selling		9.3%
III. Lawyers	24	Practice law		13.6%
IV. U. S. Employment Service		Employment		13.6%
V. Advertising, publicity & trade organizations	10	Advertising, etc.		6.6%
VI. Engineering & construc- tion	7	Engineering		8.9%
VII. Private investments	5	Financing		4.7%
VIII. Import and export	5	Executive offices		3.7%
IX. Miscellaneous	22	(no interstate commerce)		3.3%
Vacant space				11.0%

* These groups of tenants were held, by the Circuit Court, to be producers.

Conclusion

Obviously there is here no conflict of evidence. There is a difference of opinion between the District Court and the Circuit Court of Appeals in interpreting the evidence to decide whether these elevator men in a city office building are engaged in the production of goods.

Our main brief demonstrates that the Circuit Court of Appeals reached its conclusion on the basis of open, avowed and expressed dissent from the reasoning of this Court and of six other circuits.

We join with the Administrator in asking this court to apply practical judgment to the problem. Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority.

McLeod v. Threlkeld, 319 U. S. 491. There was left a large area for local regulation by the States, and nobody dreamed that Congress intended to say that an elevator man in a multi-tenanted office building is engaged in the production of goods for commerce on any such tenuous or extreme distortion of perspective as characterizes the briefs both of the respondents and of the Administrator.

These maintenance workers, admittedly, every one, got a bigger wage than the minimum to which he would have been entitled—plus overtime at time and one-half—if the owner of the building had followed the schedules of the Wage and Hour Law instead of a different schedule which yielded these men an even larger wage.

We ground our claim for reversal on the reasoning of this court in *Kirschbaum v. Walling*, 316 U. S. 517, and *Western Union Tel. Co. v. Lenroot*, U. S. , 89 L. Ed. 289.

In the *Kirschbaum* case this court held that to be included as a producer an employee must have a close and immediate tie with the process of production for commerce and those having "only the most tenuous relation to" the production of goods are not covered by the Act.

What this court said in the *Western Union* case respecting the definition of the word "handling" makes it clear that the Circuit Court was wholly in error in holding that those who sell goods are "handlers" of goods and, therefore, included as producers within the meaning of the Act.

To accept the arguments advanced by the respondent and the Administrator in this case is to abandon that "common sense accommodation of judgment" suggested by this court in the *Kirschbaum* case and to reach for the first time—six years after the law's enactment—the fantastic conclusion that maintenance employees of substantially every office building in the United States are covered by the Fair Labor Standards Act. If Congress had meant

that it could easily have said it. (Cf. *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607.)

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOSEPH M. PROSKAUER,
Counsel for Petitioner.

